SUPREME COURT, U. S.

No. 74-796

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

WOODSTOCK, INC.,

Petitioner,

vs.

NICHOLAS A. KARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. _____

WOODSTOCK, INC.,

Petitioner,

vs.

NICHOLAS A. KARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Woodstock, Inc., appellant in the court below prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Petition for Leave to Appeal to the Supreme Court of Illinois having been denied.

Opinion Below

The opinion of the Appellate Court of Illinois, First Judicial District, reported at 19 Ill. App. 3d 1, 312 N.E. 2d 426 (1974) is appended hereto as Exhibit A. The Appellate Court's Supplemental Opinion, reported at 19 Ill. App. 3d 1, 12, 312 N.E. 2d 426, 434 (1974) is appended hereto as Exhibit B.

Jurisdiction

The Appellate Court of Illinois, First Judicial District, in an opinion dated January 18, 1974, upheld the judgment of the trial court. Petitioner's petition for rehearing was denied in an opinion dated May 17, 1974. Petitioner's Petition for Leave to Appeal was denied by the Supreme Court of Illinois on September 27, 1974. (Exhibit C) This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

I. A substantial question is presented as to whether petitioner was denied its rights, privileges and immunities as a commodity broker under Title 7, § 1 et seq. of the United States Code.

II. When petitioner is denied the right to adduce competent evidence on crucial facts in issue, are petitioner's rights violated under the Fourteenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4 of Title 7 of the United States Code (§2(a), 42 Stat. 998) provides:

> "For the purpose of this chapter the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corpora-

tion, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person."

Section 5 of Title 7 of the United States Code (§ 3, 42 Stat. 999) provides:

"Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and the products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulations imperative for the protection of such commerce and the national public interest therein."

Section 6d of Title 7 of the United States Code (§ 6, 82 Stat. 27) provides in part:

> "It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless—
>
> • • •
>
> (2) such person shall, whether a member or nonmember of a contract market, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. . . ."
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> • • •
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> "It shall be unlawful for any person, including but not limited to any clearing agency of a contract market and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant."

TABLE OF AUTHORITIES

A. *Cases*

In re Murchison, 349 U.S. 133 (1955)

Benedict v. *Dakin*, 243 Ill. 384 (1909)

Creighton v. *Elgin*, 387 Ill. 592 (1944)

Gass v. *Carducci*, 37 Ill. App. 2d 181 (1962)

Giddings v. *Williams*, 336 Ill. 482 (1929)

John v. *Tribune Company*, 28 Ill. App. 2d 300, *rev'd on other grounds*, 24 Ill. 2d 437 (1960)

Klatt v. *Commonwealth Edison Co.*, 33 Ill. 2d 481 (1965)

Libre v. *Brotherhood of Amer. Yeomen*, 168 Ill. App. 328 (1912)

People v. *Nichols*, 378 Ill. 487 (1941)

Towne v. *Towne*, 191 Ill. 478 (1901)

Underwood v. *Penn. R. Co.*, 34 Ill. 2d 367 (1966)

B. *Texts, Treatises*

McCormick on Evidence (2d ed. 1972)

Restatement (Second) of Agency (1958)

Wigmore on Evidence (3rd ed. 1940)

Statement of Proceedings

This action was brought to recover a deposit made with the petitioner for a commodity transaction which plaintiff-respondent claimed was unauthorized. Petitioner claimed the transaction was authorized by the respondent and brought a counterclaim for losses it sustained in connection with the transaction. The matter was tried without a jury and at the conclusion the trial judge entered judgment in favor of the respondent and dismissed petitioner's counterclaim.

The Appellate Court of Illinois, First Judicial District, in an opinion dated January 18, 1974, upheld the judgment of the trial court. Petitioner's petition for rehearing was denied in an opinion dated May 17, 1974. Petitioner's Petition for Leave to Appeal was denied by the Supreme Court of Illinois on September 27, 1974.

Statement of Facts

The facts, as reflected in the opinion of the Illinois Appellate Court are substantially as follows:

Respondent placed a number of commodity trades through Martin Scanlon, who at the time of the events in issue was employed as a broker by petitioner, Woodstock, Inc. *Karris* v. *Woodstock, Inc.*, 19 Ill. App. 3rd, 1, 3, 312 N.E.2d 426, 427 (1974).

On December 23, 1969, respondent verbally authorized the purchase of pork belly futures through Scanlon. Respondent realized a $56,505.00 profit on his December 23 trades. He gave $16,000 of this profit to Scanlon. *Id.*

On March 17, 1970, respondent deposited $50,000 in a trading account with Woodstock, Inc. A government quarterly report on pork bellies was to be issued after the close of trading on March 20. On March 20, orders were placed for respondent's account which resulted in the loss of his $50,000 deposit and a loss of $23,920 in excess of the deposit. The quarterly report had had an unfavorable effect on the market. 19 Ill. App. 3rd at 3-5, 312 N.E.2d at 428-29.

The central factual issue in this case was whether the trades which Martin Scanlon placed for respondent Karris' account on March 20 were authorized by Karris. There was testimony from respondent to the effect that he had not authorized the trades, and that he did not learn of the trades until after the close of trading on March 20, 1970. After the close of trading, and after the issuance of the government report, respondent disavowed the trades which were placed for his account on March 20. He testified that he had not authorized the trades, and did not learn of them until he called petitioner's office in Kansas City to arrange for a refund of his $50,000 deposit. 19 Ill. App. 3rd at 4-5, 312 N.E.2d at 428-29.

Scanlon's deposition testimony was that he thought that he and respondent were "in concert" to get long on the market, and that he had placed the orders for respondent's account without specific authorization from respondent. He testified that, contrary to his past practice, and despite the fact that he held several phone conversations with the respondent during trading hours, he did not advise respondent during trading hours that orders had been placed for his account and filled. 19 Ill. App. 3rd at 3-4, 312 N.E.2d at 427-28.

Richard Becker, petitioner Woodstock's vice president, who administrates the functions of the company, testified for petitioner that he had had several conversations with respondent during trading hours on March 20. He further testified that he had discussed with respondent the orders which had been placed and were being filled for respondent's account. 19 Ill. App. 3rd at 7-8, 312 N.E.2d at 430-31.

In short, there was conflicting testimony on the central question of whether respondent had authorized the trades and was aware during the course of trading on March 20 that orders were being filled for his account.

Peter Stavros was the supervisor of all petitioner's activities on the floor of the Mercantile Exchange. Scanlon placed orders with him for Scanlon's customers. On March 20, he received orders from Scanlon for Karris' account, and reported back to Scanlon as the orders were filled.

By offer of proof, Stavros stated that on March 20, 1970, prior to the close of trading, he overheard a telephone conversation between Scanlon and Karris. He further stated that during the course of that conversation Scanlon advised Karris that orders had been placed for his account and were being filled. The trial court ruled that the testimony offered by Stavros was inadmissible hearsay. The Appellate Court upheld this ruling. 19 Ill. App. 3rd at 11, 312 N.E. 2d at 433.

REASONS FOR GRANTING THE WRIT

I.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER PETITIONER WAS DENIED ITS RIGHTS, PRIVILEGES AND IMMUNITIES AS A COMMODITY BROKER UNDER TITLE 7, § 1 ET SEQ. OF THE UNITED STATES CODE.

The central factual issue in this case was whether the trades that Martin Scanlon, petitioner's employee, placed for his customer, the respondent, were authorized. By his complaint Karris alleged that petitioner Woodstock had violated its duties to respondent arising under the Commodity Exchange Act, 7 U.S.C. § 1 et seq. (Compl. ¶¶ 1 & 3). By Answer and Counterclaim, petitioner admitted being subject to the Commodity Exchange Act as a commodity broker, but denied in any way violating its duties under the Commodity Exchange Act (Ans. ¶¶ 1 & 3). After hearing conflicting testimony on the lawfulness of the authorization for the trades in issue, the trial court found that the trades were not authorized by the respondent. The appellate courts of Illinois upheld this finding, and held that Scanlon was therefore acting as petitioner's agent in placing the trades. Even assuming that respondent had not authorized the trades and that Scanlon was petitioner's agent, the courts below failed to recognize the importance of going beyond this issue to the issue of whether Scanlon acted within the scope of his employment. This latter issue must now be examined and decided under § 4 of 7 U.S.C., § 1 et seq., the Commodity Exchange Act, which requires that petitioner not be held liable for the acts of its agent unless those acts were performed within the scope of his employment.

In particular, § 4 of the Commodity Exchange Act provides as follows:

> "For the purpose of this chapter the act, omission or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent or other person."

In providing for regulation of the futures market, Congress in the above section recognized that it was necessary to protect customers in the futures market by providing that the acts of employees of exchange members would be deemed the acts of the members in some circumstances. Congress also recognized the necessity of protecting members of the commodities exchanges against the imposition of unwarranted and absolute liability for the acts of anyone employed by them. Both of these congressional policies are embodied in the language of § 4 of the Act.

In the instant case, the decisions below hold that Scanlon, the broker, was an agent of petitioner, and conclude from that that Scanlon was acting within the scope of his employment in placing the orders for futures contracts on March 20. The Illinois Appellate Court justified this conclusion with the statement that:

> "The executing of orders was defendant's [Petitioner's] basic function. Defendant [Petitioner] presented proof that a commission charge of $2700 would be due from the alleged transaction. This demonstrates that Scanlon was directly advancing defendant's interests." 19 Ill. App. 3d 1, 13, 312 N.E. 2d 426, 435 (1974).

Section 6d of the Act provides in part that:

> "It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless—
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> "(2) such person shall, whether a member or nonmember of a contract market, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. . . ."
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> "It shall be unlawful for any person, including but not limited to any clearing agency of a contract market and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant."

A violation of this provision carries with it the penalties provided for in § 13(c) of the Act which reads as follows:

> "Except as provided in paragraphs (a) and (b) of this section, it shall be a misdemeanor punishable by a fine of not more than $10,000 or imprisonment for not more than one year, or both, together with the costs of prosecution, for any person to violate the provisions of sections 6-6e, 6h, 6i or 12b of this title, or to fail to evidence any contract mentioned in section 6 of this title by a record in writing as therein required."

The finding below that Scanlon acted without authority in placing the trades suggests a violation by Scanlon of these provisions of the Act. Yet the decision below concludes that this conduct was within the scope of Scanlon's employment. Petitioner specifically requested a hearing on appeal on this issue, but it was denied.

Whether the conduct involved in the present case—conduct which is specifically prohibited by the Commodity Commodity Exchange Act and conduct which might in some circumstances constitute a criminal violation of the Act—is "within the scope of employment" of an exchange member's agent is a question which has not been presented to the federal courts. As of this writing, no federal cases have been discovered which have decided this question. The question must be decided in light of the congressional purposes embodied in section 4 of the Act and not in the conclusory manner in which it was decided in the courts below.

The decisions below appear to be based on the assumption that since a loss has been incurred, and must be borne by someone, it should fall on the petitioner whose agent's unauthorized conduct resulted in the loss. The court below proceeded on an either/or assumption as to who should bear the loss. It ignored the congressional policy embodied in § 4 of the Act that an exchange member's liability for the acts of its agent is limited to acts done within the scope of his employment. Where, as here, the act was outside the scope of his employment, the loss should be borne, as Congress intended, by the agent.

The standard which should govern the determination, under section 4 of the Commodity Exchange Act, of whether an agent's act is within the scope of his employment, is the standard which petitioner argued below. When, as

here, the agent acts in gross defiance of his principal's rules, and is aware that his activities exceed the scope of his authority, his act is not within the scope of his employment. *Restatement (Second) of Agency* § 235 (1958). The decision below, by failing to apply this standard, imposes liability on petitioner despite the limitation of liability contained in Section 4 of the Commodity Exchange Act.

Petitioner contended below, and it was not contested, that it had fully complied with the rules of the Chicago Mercantile Exchange and the requirements of the Commodity Exchange Act. Yet, the decisions below deny petitioner the protections Congress afforded it under the Act, notwithstanding that petitioner has complied with the rules of the Exchange and the requirements of the Act.

The result reached below, if permitted to stand, would have a serious and disruptive effect on the conduct of business in the futures markets. It is well recognized that the overwhelming majority of orders placed by customers in the futures markets are oral and not written, and, like other markets, such as the securities markets, millions of dollars of obligations are entered into daily on the basis of verbal communications between brokers and buyers or sellers. Particularly in the commodity market, in which small changes in price in a margin transaction are multiplied several times in magnitude, speed of execution in buying or selling is essential to the maintenance of an orderly market. A broker must rely on his customer in forwarding an oral order for execution; the customer must rely on the broker to cause an oral order to be executed. If, as in the instant case, the exchange member must bear the loss when a broker acts without authority, or when an authorized contract is repudiated by a customer, the ability of those involved in the market to rely on the integrity of oral orders is jeopardized.

In the instant case respondent maintained with petitioner the type of account in which trades could only be made if specifically authorized by the customer. If the loss for unauthorized trading by an agent is to fall on his employer, even though the trading is in violation of the Commodity Exchange Act and/or outside the scope of the agent's employment, exchange members might feel compelled to protect themselves by requiring written authorization before trades will be made for this type of account. If exchange members attempt to protect themselves in this manner against the imposition of a liability which Congress did not intend, the orderly functioning of the futures markets will be disrupted by the delays ensuing therefrom.

Surely such a result was not intended by Congress and further illustrates the fatal error of the courts below in this case: they failed to correctly apply the standards of agency set forth in § 4 of the Commodity Exchange Act. By failing to apply these standards, the state courts have deprived Petitioner of the rights, privileges and immunities granted to it by Congress under the Commodity Exchange Act.

II.

WHEN PETITIONER IS DENIED THE RIGHT TO ADDUCE COMPETENT EVIDENCE ON CRUCIAL FACTS IN ISSUE, ARE PETITIONER'S RIGHTS VIOLATED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Karris repeatedly testified at trial that he did not learn that orders had been placed for his account until after the close of trading on March 20, 1970. Martin Scanlon testified that he had not advised respondent during trading hours of the fact that orders were being filled for his account. Stavros' testimony, if admitted, would have directly

contradicted both the respondent and Martin Scanlon on this crucial factual issue.

Hearsay evidence is testimony of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. McCormick on Evidence (2d ed. 1972) §246, p. 584. *Gass* v. *Carducci,* 37 Ill. App.2d 181, 187 (1962). As is apparent from the definition, the hearsay rule does not apply when an out-of-court statement is used not as evidence of the fact asserted but as circumstantial evidence for another purpose. 6 Wigmore on Evidence, §§ 1788-1789 (3rd ed. 1940). *Gass* v. *Carducci,* 37 Ill. App. 2d 181, 187-188 (1962). When knowledge or belief is one of the issues on the trial, a declaration made by the person in question or by others may constitute circumstantial evidence bearing on the issues and the hearsay rule would have no application. *John* v. *Tribune Company,* 28 Ill. App.2d 300, 313; *Towne* v. *Towne,* 191 Ill. 478 (1901); *Benedict* v. *Dakin,* 243 Ill. 384 (1909); *People* v. *Nichols,* 378 Ill. 487 (1941).

In *Gass* v. *Carducci, supra,* an automobile repairman was allowed to testify concerning statements made to him by the defendant's husband which indicated that the husband was aware of the defective condition of a door lock prior to an accident. The statements were offered to establish not the defectiveness of the lock, but defendant's awareness of the defect. Stavros' testimony, like the testimony of the repairman in *Gass,* was offered not for the purpose of establishing the truth of any of the statements which he had overheard, but solely for the purpose of establishing that a conversation had taken place between Karris and Scanlon and that in the course of that conversation, Kar-

ris had been advised by Scanlon that orders had been placed for Karris' account and filled. The witness had firsthand knowledge of this conversation and was competent to testify to its content.

The testimony was offered to establish the crucial fact of Karris' awareness during the course of trading that orders had been placed for his account. On this issue, the testimony was not hearsay but was admissible substantive evidence on this crucial question. Thus, the trial court erred in characterizing Stavros' testimony as inadmissible hearsay.

As a general rule, the exclusion of competent, material evidence on a question in issue is reversible error. *Creighton* v. *Elgin,* 387 Ill. 592 (1944); *Underwood* v. *Penn. R. Co.,* 34 Ill. 2d 367 (1966); *Klatt* v. *Commonwealth Edison Co.,* 33 Ill.2d 481 (1965); *Giddings* v. *Williams,* 336 Ill. 482 (1929). This is particularly true where the issue was closely contested. *Libre* v. *Brotherhood of Amer. Yeomen,* 168 Ill. App. 328 (1912).

Under these circumstances, and in light of the importance of Stavros' testimony to the trial of this matter, the trial court's exclusion of Stavros' testimony denied petitioner the due process of law guaranteed by the 14th Amendment to the United States Constitution. *In re Murchison,* 349 U.S. 133, 136 (1955).

CONCLUSION

Petitioner respectfully prays that a Writ of Certiorari issue to review the substantial federal questions presented herein.

Respectfully submitted,

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APPENDIX

APPENDIX A—Opinion of the Appellate Court of Illinois, First Judicial District, January 18, 1974, Woodstock, Inc. v. Karris, No. 58222.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Plaintiff brought suit for the return of a $50,000 deposit he had placed with defendant. Defendant answered claiming plaintiff had authorized several commodity transactions resulting in losses over and above the amount of the deposit and counterclaimed for $23,920, the amount of this excess loss. Although the complaint was for a declaratory judgment and other relief, the matter was transferred to the law calendar and tried without a jury. The court entered judgment in favor of plaintiff for $50,000 and costs and dismissed defendant's counterclaim.

Defendant contends: (1) the court erred in allowing an evidence deposition to be used at trial; (2) the court erred in not ruling on certain objections and made inconsistent rulings in the admission of evidence; and (3) that this judgment is against the manifest weight of the evidence.

Evidence

The testimony of Martin Scanlon, by deposition (objected to by defendant), was as follows: During the relevant period in issue, he was employed by the defendant as commodity broker and manager of defendant's office in Kansas City, Missouri. The deposition was taken December 22, 1970, at which time Scanlon was residing in Leawood, Kansas. At the time of the deposition, Scanlon was unemployed. He had known plaintiff since 1958.

In December of 1969 plaintiff had an account with defendant. During this period plaintiff traded in February pork bellies. The trades turned out to be very profitable and plaintiff gave him roughly one-third of the profit or about $16,000. A Mr. Gene Shapiro had an equity interest in this trade with plaintiff but Scanlon denied having

any equity in the trade himself nor was he to share in any portion of a loss, if there had been one. With regard to this trading he had been verbally authorized by plaintiff to execute this trade. Also, he thought he probably advised plaintiff, while the market was open, that orders had been filled for plaintiff's account.

On March 17, 1970, he had a phone conversation with plaintiff concerning commodities in which he suggested that plaintiff trade in pork belly futures. Thereafter, sometime between March 17 and 20, plaintiff deposited $50,000 with defendant. In making his recommendation to plaintiff he used as a factor for his opinion a government quarterly report. This report is made public after the market closes on the day of issuance and was to be released on March 20, 1970.

During the day of March 20 he had several telephone conversations with plaintiff. The first conversation occurred between 9:30 and 10:00 A.M. and concerned the general market conditions relative to pork bellies. During this conversation plaintiff asked to be kept posted on the market. In his next conversation with plaintiff he discussed the margin requirements for pork belly futures and told plaintiff that defendant would require $1000. rather than $700, as a margin for each contract. Plaintiff responded that he wanted to look around and see what margins were required from other commodity houses. After this conversation he also checked the margin requirements at other commodity houses.

From March 17 through and including March 20 plaintiff never specifically placed an order to purchase any commodity, nor was an order placed during any of these conversations. Nevertheless, some time around mid-morning

on March 20, he placed orders for plaintiff's account. He felt that "we were in concert to get long on the market." "In concert" meant that he felt both he and plaintiff believed the market would go up. He also thought their thinking was the same with regard to the trading in March 1970 as it had been in December 1969. Although he thought his thinking was the same, plaintiff never told him that it was the same.

In placing the orders he called up the defendant and told defendant's employes to buy $50,000 worth of July pork belly futures but did not give them an order to buy 75 contracts, which was the amount eventually purchased. He didn't specifically remember, but he thought defendant would report the fills (executed orders) either to himself or his secretary from time to time during the day. As these reported fills were received, he did not communicate these to plaintiff. He did not speak with plaintiff at any time prior to the close of the market to report that orders had been filled for his account. He did think that other people in the office would have advised plaintiff of the filled orders.

After the market closed on March 20, and some time that evening, he had another phone conversation with plaintiff, which was rather heated, at which time he advised plaintiff of the filled orders. In this conversation plaintiff threatened to sue him and defendant. On the following day he had another phone conversation with plaintiff in which he told plaintiff, "that is the way it was. That is the ball game." On cross-examination it was brought out that one other customer disavowed a purchase of July pork bellies made by Scanlon on March 20, 1970.

Testimony of plaintiff in his own behalf:

On December 23, 1969, while the market was open, he authorized Scanlon by phone to execute trades for him. Later, and before the market had closed, Scanlon called him and advised him that his orders had been filled. The order in December 1969 was specific and was not discretionary. He had requested that Scanlon report fills to him and stated he would require this of anyone. He gave one-third of the profit on the December trade to Scanlon as a gratuity. As far as that trade was concerned, a verbal agreement did exist, in the nature of a three way division of profits and losses, but only he and Gene Shapiro had made an equity investment in the trade. No similar agreement existed with regard to his March deposit of funds with either Scanlon or Shapiro. Defendant impeached plaintiff by introducing a Commodity Exchange Authority form entitled "Statement of Reporting Trader." In this form plaintiff had checked "no" when asked if other persons have any financial interest in his account, but where next to the question it states, "If yes, give name and address of such person(s)," he listed Scanlon and Shapiro.* Plaintiff claimed he filed the wrong document by mistake but has never called the Commodity Exchange Authority about the document.

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* Another question in this form asked if the individual was a member of a partnership dealing in commodity futures, which was answered "no." The form also asked if any other person controlled the trading in the account which was likewise answered "no."

It was brought out later, in the testimony of Richard Becker, that this form had to be filed the same day or the next day after a trade is executed. This form was filed in February, at least a month prior to March 20.

On March 17, 1970, he delivered to defendant a certified check for $50,000. On this day he had a phone conversation with Scanlon about the general market conditions for pork belly futures. Scanlon felt the market was bullish, that it would probably go up. Between March 17 and 19 several other conversations occurred but only concerning "May pork bellies." It is a rule of the houses he has traded with that some money must be advanced before a customer can trade commodities.

Some time in late February or early March he also discussed trading in commodities with Leo Waxman, a friend and business associate. Waxman gave him $10,000 to open an account for him. Authority to execute this account had to come from Waxman although Waxman relied entirely upon him for his investment. No trading was done in this account. With regard to his own $50,000 deposit, no one else had an interest, neither Waxman, Shapiro nor Scanlon.

Right after the opening of the market on March 20, between 9:30 and 10:00 A.M., he called Richard Becker, a vice-president of defendant. He asked Becker's opinion of the market in May pork bellies. Becker was not in favor of a bullish or a long position and did not favor trading on the basis of an anticipated government crop report. He only had one conversation with Becker while the market was open. He also spoke with Scanlon early that morning and asked him about general market conditions. Scanlon said he was bullish, but there was a variety of opinions. In a later conversation with Scanlon he was informed that the margin requirement had been changed by defendant from $700 to $1000. He then told Scanlon that he was disturbed by this change and wanted to call

around. He later spoke with Scanlon and told him to do nothing until he called back. On March 20 he never placed an order for pork bellies.

After the market closed and while calling the Kansas City office to arrange a refund of his money, he was first advised that orders had been entered for his account. When he learned his account was charged with these orders, he made a demand for refund of his money. He first called Richard Becker to demand a refund of his money but was refused. He then sent a telegram to defendant in Chicago, time stamped 4:00 P.M., reciting that defendant had no authority to execute any order and again demanding a refund of his money.

In the early evening of March 20 he spoke with Scanlon and again demanded his money back. Plaintiff was asked on cross-examination whether Scanlon had given a reason for not refunding the money and stated he didn't remember. He was impeached by prior deposition testimony wherein he had stated, "He [Scanlon] refused to refund the money. His position at that time was that I had made these orders."

Scanlon could only deal with specific orders as to price and quantity and commodity. Scanlon never had any discretionary authority.

It was brought out on cross-examination that plaintiff spoke with Scanlon a few weeks prior to the trial and that they were friends.

Testimony of Leo Waxman, for plaintiff:

He had discussed trading in commodity futures with plaintiff and decided to join with him in trading. On March 19 he gave plaintiff a check for $10,000. On March 20 he had several conversations with plaintiff. In the first

conversation, occurring probably before 9:00 A.M., plaintiff told him that this was the day they would either trade or not. Around noon he had another conversation with plaintiff who told him "Forget it, we are not doing anything today, do what you want to do, go on about your business." Later in the day he had a third conversation with plaintiff. He was then told, "You had better call the broker and find out if they have used your money. They have used mine, and I gave them no authority to do it. See if your money is there. I am going to have troubles. See if you will have some troubles."

On cross-examination it was brought out that he and plaintiff are friends and have had a variety of social and business dealings. His funds were not used for the purchase of commodies and he subsequently got his money back.

Testimony of Gene Shapiro, for plaintiff:

In December 1969 he had been involved in a commodities futures transaction with plaintiff and Scanlon. The defendant had been the brokerage house involved. He had put up $22,500 of the total $45,000 deposit that had been made. Plaintiff in a conversation in March had asked him if he would be interested in a similar situation to December, which he turned down. During a conversation with plaintiff on March 20 plaintiff told him he wasn't going to trade. On March 20 he did not participate in any commodities transaction with plaintiff.

Testimony of Walter Kowalski, head statistician at the Chicago Mercantile Exchange, for defendant:

The government pig report is released from his office at 2:00 P.M. Chicago time and is available to the public around 2:15 P.M. These reports can have a bearish or bullish effect on the market.

Testimony of Peter Stavros, supervisor of all defendant's activities on the floor of the Merchantile Exchange, for defendant:

He was under instructions to keep his employers informed at all times of what customers are trading, what their positions are and what they wish to do in the market at all times. Scanlon would place orders with him for Scanlon's customers. He never talked personally with plaintiff. On December 23, 1969, he put in orders for plaintiff and reported back to Scanlon.

On March 20, 1970, orders were placed for plaintiff between 11:30 and 12:30. After filling each of these orders, he would report to Scanlon. He would also immediately report the fills to either Richard or Sidney Becker. Subsequently he sold the 75 cars for the account of plaintiff, pursuant to Scanlon's instructions. He does not receive orders from customers directly; rather, he receives them from salesmen or branch managers. On March 20 he reported to Scanlon that the orders were placed.

Testimony of Richard Becker, defendant's vice-president who administrates the functions of the company, for defendant:

Plaintiff had a non-discretionary account with defendant. All orders were entered verbally. In December he told plaintiff to put all his orders through Scanlon.

On December 23, 1969, plaintiff bought around 70 cars. Every time an order was executed, Stavros would call him. During that day plaintiff had called and asked him his opinion of the market and also acknowledged the purchases he had made.

Around March 17, 1970, he had another conversation with plaintiff. Plaintiff told him another report was coming out and asked his opinion of the market. After he had a phone conversation with Scanlon about plaintiff, and at 10:00 A.M. on March 20, plaintiff again called him. Plaintiff told him, "Dick, the same situation has come up, why don't you take a fly yourself?" Plaintiff also said, "Go ahead, will buy them the same way, a few at a time, and I will be in touch with you." Plaintiff also mentioned Waxman's account. No trades were made for Waxman and his money was subsequently returned.

After the ten o'clock conversation, plaintiff called several more times during the trading day. In these conversations plaintiff wanted to know at approximately what time the orders were being given, what he was buying and where the market was at each point. In a noon conversation plaintiff wanted to know exactly how many cars he had bought and what the prices were.

The next conversation occurred around 1:00 P.M., just after the market closed. Plaintiff told him he had bought 70 or 75 cars and wanted to know the closing price. After the government pig report was issued and around 3:00 P.M., he had another conversation with plaintiff. In this phone call plaintiff said, "Dick, it looks like I am in trouble. The market is going to break wide open. I don't want those trades." At about 4:00 or 4:30 he received a telegram from plaintiff. Defendant did not participate in any equity position in these trades.

Subsequent to March 23, 1970, a margin call was issued. Thereafter, since plaintiff did not come up with additional money, defendant had to sell out plaintiff's account. In connection with the March 1970 trading, defendant had to pay $23,920 to the Mercantile Exchange.

On cross-examination he stated that in his last conversation with plaintiff on March 20, 1970, plaintiff did not say that he didn't authorize the trades. He was impeached by his prior deposition testimony wherein he stated that plaintiff told him he hadn't authorized the trades. He was also impeached as to his recitation of conversations with plaintiff during the trading day. In a prior deposition he was asked, "Did you have any conversations with Karris while they were trading?" and responded "no" to this question.

Plaintiff finally testified in rebuttal: After his first early morning conversation with Richard Becker on March 20, he had no further conversations with him while the market was open. In a subsequent conversation after the market had closed, he told Becker he had not placed any order and demanded a refund of his money.

OPINION

Defendant contends that the court erred in permitting Scanlon's evidence deposition to be used at trial without a prior showing by plaintiff of reasonable diligence to obtain the attendance at trial of Scanlon and because it appeared that Scanlon's absence was procured by plaintiff. The use of an evidence deposition at trial is governed by Supreme Court Rule 212 (Ill. Rev. Stat. 1967, ch. 110A, par. 212). In pertinent part the rule provides:

> "(b) USE OF EVIDENCE DEPOSITIONS. All or any part of an evidence deposition may be used for any purpose for which a discovery deposition may be used, and may be used by any party for any purpose if the court finds that at the time of the trial:
>
> (2) the deponent is out of the county, unless it appears that the absence was procured by the party offering the deposition, * * *; or"

Defendant points out that Scanlon and plaintiff had prior financial dealings together, that Scanlon was unemployed and that shortly before trial Scanlon had talked by phone with plaintiff while the former was in Chicago. Defendant argues that because of "bias, prejudice, financial interest, social interest and outright fear" that existed between plaintiff and Scanlon, not only could the attendance of Scanlon at the time of trial have been procured through reasonable diligence, but that Scanlon's absence was obviously dictated by plaintiff.

In urging that plaintiff had to show reasonable diligence, defendant relies on *John* v. *Tribune Co.*, 28 Ill. App. 2d 300, 171 N.E.2d 432, reversed on other grounds, 24 Ill. 2d 437, 181 N.E.2d 105. In *John,* when the evidence deposition of a witness was offered, the court stated that although there was a reference to the witness as presently living out of the state, the party offering the deposition had not shown reasonable diligence in trying to obtain the presence of the witness. The key fact which distinguishes the instant cause is that Scanlon, both at the time of the taking of the evidence deposition and at trial, was not a resident of this state but lived in Leawood, Kansas; whereas in *John* the deponent was a resident of Illinois at the time of the deposition and was shown to be out of state only at the time of trial. *Powers* v. *Kelly,* 83 Ill. App. 2d 289, 227 N.E.2d 376, seems to be directly in point. There plaintiff sued under the Dram Shop Act for personal injuries when he was shot in a tavern. Over objection plaintiff introduced an evidence deposition of one of the men who shot him; the deposition had been taken outside Illinois in St. Louis, Missouri. The court stated the relevant law at 296-297:

"As is pointed out in the Historical and Practice Notes following Rule 19-10 in the Illinois Annotated Statutes, subsection (3) of the rule altered the prior rule, to now provide that the test of the deponent's status is applied at the time of trial. Here the court was advised by statement of counsel, and it was shown by the deposition itself, that the deponent resided in St. Louis, Missouri, on the date it was taken, October 29, 1965, almost six months before the trial. The presumption of continuation of residence is well known in the law—residence once established is presumed to continue until the contrary is shown. In re McCalmont, 16 Ill. App2d 246, 148 NE2d 23; People v. Estate of Robert Moir, 207 Ill 180, 69 NE 905; In re Estate of Dedmore, 257 Ill App 519; in each of these cases the court held that there is a presumption of continued residence, and the burden of proof to show a change of residence is upon the party asserting such change. The showing of residence of the deponent outside St. Clair County, and in fact outside the State, raised the presumption of continuance of residence in Missouri, and as a resident of Missouri the deponent was not amenable to subpoena. C 110, § 62, Ill Rev Stats 1963."

The *Powers* court then went on to distinguish *John,* stating at page 298:

"In the present case, no such showing [of reasonable diligence] was necessary in view of the presumption of continued residence in Missouri, and deponent's not being amenable to summons. Had there been a showing that deponent had resided in St. Clair County in the present case, it would have become incumbent upon plaintiff to have made a showing, upon which the court could have based a finding; but with the presumption of continued residence in Missouri and appellants' failure to overcome the presumption, we cannot say that the court abused its discretion in admitting the deposition."

Nor was there probative evidence presented in the instant case to demonstrate that plaintiff procured the absence of Scanlon. Although defendant has made allegations to this effect, he has only shown that Scanlon may have been biased in favor of plaintiff. This alone will not serve to demonstrate that plaintiff procured the absence of Scanlon. Therefore, we find that the court did not err in admitting the evidence deposition at trial.

Defendant next argues that the trial court committed prejudicial and substantial error in not ruling on certain objections and by making inconsistent rulings in the admission of evidence. Defendant points to three specific instances to justify this contention: (1) the court never ruled on objections contained in Scanlon's evidence deposition; (2) the court excluded certain hearsay testimony; and (3) the court precluded Richard Becker from testifying as to conversations with plaintiff on March 20. Although defendant cites these rulings or lack thereof to support his contention of prejudicial error, he has not cited any cases nor attempted to show how each individual ruling was erroneous. Nevertheless, we will review each claim.

While Scanlon's evidence deposition was being taken, defendant objected to the form of many of the questions as being leading questions. At trial, when the deposition was being read into the record, defendant again objected. The court reserved ruling on these objections until after he had heard the entire deposition. The defendant never renewed his objections nor did the court make any ruling.

In *Cusanelli* v. *Steele*, 287 Ill. App. 490, 5 N.E.2d 296, the court gave an excellent description of the law in this area when it stated at page 495:

"The record does not show that the court made any ruling thereon, hence there is nothing for the consideration of this court relative to the offer of such evidence. *Where a ruling on objections to evidence is reserved, and not afterwards made, there is no ruling for consideration on review. Mitchell* v. *Chicago, B. & Q. Ry. Co.,* 265 Ill. 300.

"To avail of an objection, counsel must insist upon a ruling of the trial court upon the objection, and must either obtain a ruling or a refusal of the court to rule. Mere failure to rule is not sufficient. *City of Salem* v. *Webster,* 192 Ill. 369; *Summerville* v. *Penn Drilling Co.,* 119 Ill. App. 152; *Chicago & E.I. R. Co.* v. *Heilingstein,* 137 Ill. App. 35. The law upon this question is stated in 3 Corpus Juris, p. 889, sec. 795: 'As a general rule, error alleged in the admission or rejection of evidence, cannot be considered by the reviewing court if it does not appear from the record that there was a ruling relating thereto.'

"Here the record fails to disclose a ruling upon the objection to the offer of the exhibits, and further does not show that defendant insisted upon such ruling, or that the court refused to make same; hence, within the rule of the authorities cited, there is nothing for the consideration of the court upon the proposition." [Emphasis supplied.]

(See *Jones* v. *Lukas,* 122 Ill. App. 2d 162, 258 N.E.2d 147; *Rasmussen* v. *Clark,* 346 Ill. App. 181, 104 N.E.2d 325.) In accordance with the authorities above cited, we find that any alleged error was waived.

Defendant has pointed to numerous instances where the court sustained plaintiff's objection to testimony of conversations between defendant's employes as being hearsay. We have reviewed the relevant portions of the record and find these conversations were hearsay and that the court's rulings were proper.

Defendant argues that the defense witness, Richard Becker, was precluded from testifying as to conversations with plaintiff on March 20. The court sustained plaintiff's objections to defendant's questions on this subject as being repetitious. "Where a witness has already testified fully as to the facts involved, it is not improper for the court to restrict repetitious interrogation. *People* v. *McCain,* 29 Ill. 2d 132." (*People* v. *Davis,* 35 Ill. 2d 55, 62, 219 N.E.2d 468; *Chism* v. *Decatur Newspapers, Inc.,* 340 Ill. App. 42, 91 N.E.2d 114.) Contrary to defendant's above assertion, Richard Becker was allowed to fully recite the substance of these conversations. It was only when the questions were repetitive that the court sustained plaintiff's objections, and at those times the court in commenting on its rulings stated in detail the witness' prior testimony as to these conversations. The court acted within its discretion, and we find no error in these rulings.

Finally, defendant argues that the judgment was against the manifest weight of the evidence. He urges this court to review the record without giving any weight to what the trial court may have found regarding Scanlon's deposition, since the court could not view the demeanor of that witness. We agree that insofar as this deposition is concerned, we are in equally as good a position as the trial court to weigh the evidence. But the trial court was in a superior position to observe the demeanor and the credibility of the many other witnesses who testified, including the plaintiff and the two major officers of the defendant. While a trial court's finding is always subject to review, it will not be disturbed unless manifestly against the weight of the evidence. In such case an opposite conclusion must be clearly evident. (*Comm.* v. *Goodman,* 6 Ill. App. 3d 847, 286 N.E.2d 758.)

The court had before it the testimony of plaintiff and Scanlon denying that plaintiff authorized any trades. The court also heard the corroborative testimony of Waxman and Shapiro that plaintiff did not trade on March 20 and evidence that at least one other customer of Scanlon disavowed a trade Scanlon made for him on that day. Although defendant's witnesses directly contradicted plaintiff's position, the court could have felt that this testimony was at least partially impeached when Richard Becker stated that during the day of March 20 he had several conversations with plaintiff wherein he confirmed the orders, whereas Becker, in a prior deposition, had stated that he had no conversations with plaintiff while they were trading.

From a review of the record we cannot say that an opposite conclusion is clearly evident.

The judgment is affirmed.

AFFIRMED.

ENGLISH and LORENZ, J.J., concur.

APPENDIX B—Supplemental Opinion of the Appellate Court of Illinois, First Judicial District, on Denial of Petition for Rehearing, May 17, 1974.

MR. JUSTICE DRUCKER delivered the opinion of the court:

SUPPLEMENTAL OPINION ON DENIAL OF PETITION FOR REHEARING

On January 18, 1974, this court issued its opinion affirming a judgment of the circuit court in favor of plaintiff for the return of plaintiff's $50,000 deposit. Defendant had withheld these funds because of losses sustained as a result of certain commodities transactions which defendant claimed plaintiff authorized. Implicit in our opinion was the conclusion that Martin Scanlon, who admitted making the purchases of commodity futures, was defendant's agent and not the agent of plaintiff. In the instant petition defendant asserts that this court misapprehended the state of the record when it found that the trial court's determination of agency was not against the manifest weight of the evidence.* More specifically, defendant contends that Scanlon, in placing the March 20th trades, (1) was acting as plaintiff's agent and not defendant's agent, and (2) if he was defendant's agent, he was acting outside the scope of his employment. To support this contention defendant relies on the facts that Scanlon received no salary from defendant and that plaintiff controlled Scanlon's actions.

We have reviewed the record and find that the evidence overwhelmingly refutes defendant's instant arguments. There is evidence to demonstrate that for a period of time,

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* In the original briefs filed with this court this issue of agency was raised only collaterally. Defendant alleged that Scanlon and plaintiff were acting in concert and so plaintiff should have been bound by Scanlon's actions. No case authority was originally cited to support the contention that Scanlon was plaintiff's agent.

including the relevant dates in question, Scanlon was employed by defendant as a broker and manager of its Kansas City office. It is true, as defendant avers, that Scanlon did not receive a salary until April or May. However, he was being paid by defendant for soliciting business.

Defendant asserts that Scanlon was controlled by plaintiff. It must be noted that plaintiff had a non-discretionary account with defendant. Defendant could not act without specific orders as to price, quantity and commodity. Defendant, in its opening statement to the court, characterized its business as accepting and executing orders to buy or sell. Therefore, in carrying out defendant's activities, Scanlon was limited to executing specific buy and sell orders from plaintiff. This evidence concerning the control plaintiff had over Scanlon is not indicative of an agency relationship. It was actually defendant who exercised control over Scanlon, for the evidence demonstrated that Scanlon was limited by defendant's margin requirements which were communicated to him.

The proof presented other factors which refute defendant's contentions: No evidence was introduced that Scanlon executed orders through any other clearing members, besides defendant; Richard Becker, defendant's vice-president, initially told plaintiff to put all orders through Scanlon; Becker stated that any refunds must be made directly to plaintiff and could not be given to Scanlon; and with regard to the alleged transaction in March, Scanlon was the person who initiated the first conversation with plaintiff, rather than plaintiff coming to Scanlon.

Defendant asserts that Scanlon looked to plaintiff for compensation and that he was only furthering his own interest, thus acting outside the scope of his employment. It bases this argument on the fact that in a prior trade (December) Scanlon received a gratuity from plaintiff.

We have already noted that defendant paid Scanlon for soliciting customers. There was no evidence in the record to show that there was any agreement that plaintiff would compensate Scanlon for the alleged March trading. The most that can be said was that if plaintiff made a profit, he might have rewarded Scanlon with a gratuity. Also, any orders executed would directly benefit defendant's interests. The executing of orders was defendant's basic function. Defendant presented proof that a commission charge of $2700 would be due from the alleged transaction. This demonstrates that Scanlon was directly advancing defendant's interests.

Finally, we take note of the following colloquy occurring between plaintiff's counsel, defendant's counsel and the court:

> "Mr. Collins [plaintiff's counsel]: The broker calls in the order on behalf of his own company. Scanlon, by statute, is the agent of Woodstock.
>
> The Court: That is my understanding.
>
> Mr. Collins: And when Scanlon called Stavros who is also a Woodstock agent, that is two agents of the same principal talking to each other, and that conversation goes back and forth, which is self-serving, within the purview of his client's business and not within the purview of my client.
>
> Mr. Rothbart [defendant's counsel]: We are not denying that."

We have reviewed the cases cited by defendant and find them to be distinguishable on their facts. There was sufficient evidence in the record to support the finding that Scanlon was not plaintiff's agent. The petition for rehearing is denied.

PETITION FOR REHEARING IS DENIED.

SULLIVAN, P.J., and LORENZ, J., concur.

APPENDIX C—Denial of Petition for Leave to Appeal by Illinois Supreme Court, September 27, 1974, Woodstock, Inc. v. Karris, Number 48606.

October 1, 1974

TO ATTORNEYS OF RECORD AND PARTIES:

In the cases listed below, petitions for leave to appeal were denied on September 27, 1974, and the final order would ordinarily be forwarded to the appropriate Appellate Court Clerk on or about October 21, 1974. Since no appearance was made by respondents in these cases, the mandate will not be issued on such date unless we receive the statutory mandate fee of $5.00.

Justin Taft
Clerk of the Supreme Court

No. 46806—Nicholas A. Karris, respondent, vs. Woodstock, Inc., petitioner. Leave to appeal, Appellate Court, First District.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1973

WOODSTOCK, INC.,

Petitioner,

vs.

NICHOLAS A. KARRIS,

Respondent.

ANSWER TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN OPPOSITION TO SAID PETITION

The Respondent, Nicholas A. Karris, submits, that Certiorari should be denied in this case, and that the petition itself does not conform to the rules of this Court. The Respondent, therefore, asks that the petition be denied. In support of this prayer Respondent argues as follows:

REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT CONFORM TO THE RULES OF THIS COURT.

The petition ignores Rule 23(f) of the Rules of this Court. The petition purports to raise Federal questions arising out of the Commodity Exchange Act (Title 7, U.S. Code, Sections 1 et seq.) but does not specify when or where or in what manner those questions were raised below. The opinion of the Illinois Appellate Court does not pass on those questions. The Supplemental opinion on petition for rehearing does not reveal the presence of any Federal claim, and the denial of petition for leave to appeal by the Supreme Court of Illinois reveals no such question. No averment is made that such question was ever raised, and we respond and say that this petition for certiorari is the first suggestion in this most mundane of all cases that a Federal question is involved. The presentation of this petition in a most ordinary piece of State Court litigation is an abuse of the right to file such petitions, and should be denied under Rule 23(4) of the Rules of this Court.

II.

THE PETITIONER HAD NO SPECIAL RIGHTS UNDER THE COMMODITIES EXCHANGE ACT WHICH WERE VIOLATED IN THIS CASE.

The trial court heard the evidence. His Honor decided that Karris did not authorize certain trades in his account.

His Honor, therefore, held that Karris should get back his money,which he had deposited to trade, and that Karris should not be obliged to pay for certain losses suffered when unauthorized trades were placed against his account. The factual issue was properly tried, and the conclusion was almost inevitable when it is considered that the Respondent's principal officer testified one way on his deposition and a different way at trial. Perjury is almost never prosecuted when it occurs in civil cases, but it plainly occurred here, and it should, at least, allow a trial judge the privilege of disregarding at least one of two entirely conflicting stories.

Now, for the first time, it is argued that the Commodities Exchange Act, which contains a recital of the rule of respondeat superior (Title 7 U.S.C. Section 4) should require that the customer, who did not authorize a trade, bear a loss as opposed to the brokerage house, which wrongfully placed the trades in his account. Broad statements (without citation of legislative history) are made as to Congressional intent, and now it is claimed that the scope of the agent's authority is, somehow, a Federal question.

We contend that nothing in any Act or Federal law requires that the broker's customer pay for unauthorized trades. No case says so; no statute says so. The lower courts were right on the law as argued, and the result is right.

We add that the petitioner had the right to attempt to remove the case to Federal Court if it felt this were a case in which Federal jurisdiction were exclusive. There was no attempt at removal.

III.

THE ILLINOIS COURTS CORRECTLY DECIDED THE HEARSAY QUESTION.

Petitioner seeks to raise to the level of a Federal due process question the ruling by the trial court that a Woodstock employee could not testify to what he heard another Woodstock employee say into a telephone. The witness did not hear the other end of the call, and had no direct knowledge of who was on the other telephone.

This was considered to be hearsay by the trial court. There was no mention of the Federal constitution at the trial, and "hearsay" did not become "due process" until the need arose to write a petition for certiorari. We contend that this conversation did in fact come within the hearsay objection. The words sought to be quoted were not shown to have been said within the presence of Karris or by Karris; they were offered to show the truth of the point in question, which was that Karris knew of the trades, and the words were an unsworn, out of court statement. We add that the person quoted, Scanlon, testified by evidence deposition at the trial. He was cross-examined, but was never asked about that particular conversation. It is the Respondent's belief that the quoted conversation was, like the Becker conversation with Karris, an afterthought inserted in a desperate attempt to change the result of the trial after the initial evidence had gone adversely. We contend that the ruling of the trial court was correct.

PRAYER

We submit that the petition should be denied.

Respectfully submitted,

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